RECENT DECISIONS.

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ATTORNEY'S LIEN—WAIVER.—An attorney agreed to receive a salary of $5,000 a year from a corporation as compensation for all his professional services. *Held,* he thereby waived his charging lien on a suit prosecuted by him for the corporation. *Matter of Heinscheimer* (1915) 214 N. Y. 361. See Notes, p. 529.

BANKRUPTCY—JUDGMENT ON PROVABLE CLAIM—EFFECT OF DISCHARGE.—After the institution of a creditor's suit the debtor was declared insolvent and the claim proved and allowed against his estate. Thereafter judgment was had in the original suit and later a discharge was granted in insolvency. Action was then brought upon the judgment. *Held,* the plaintiff could recover. *Jordan* v. *McKenzie* (Me. 1915) 92 Atl. 995.

The controversy which formerly existed as to the effect of a discharge in bankruptcy on a judgment founded upon a provable claim and obtained after adjudication but before discharge was finally set at rest by the decision of the Supreme Court in *Boynton* v. *Ball* (1886) 121 U. S. 457, the rule of which case is now embodied in § 63 a, (5) of the Bankruptcy Act of 1898. Prior to that it was held by some courts that since the original claim could not be proved because merged in the judgment and since the latter could not be proved because not in existence at the time of adjudication the discharge had no effect upon either. *In re Williams* (D. C. 1868) 2 Nat. Bankr. Reg. 229; *Sampson* v. *Clark* (Mass. 1848) 2 Cush. 173. Others, however, pointed out that the judgment was simply the old debt in a new form and that it would be most inequitable to allow the technical doctrine of merger to work an injustice upon either honest insolvents or their creditors. They accordingly held that taking judgment after adjudication did not prevent proof of the claim and that consequently the discharge would bar it. *In re Brown* (D. C. 1870) 3 Nat. Bankr. Reg. 584; *Clark* v. *Rowling* (1850) 3 N. Y. 216. Under this view, which came to prevail, *Huntington* v. *Saunders* (1896) 166 Mass. 92, the judgment is regarded as simply new evidence of the old debt and the latter is the substantive claim to be proved in the bankruptcy proceedings. *In re Pinkel* (D. C. 1899) 1 Am. B. R. 333. After those proceedings have been closed by the discharge of the insolvent he may, upon motion, have execution of the judgment perpetually enjoined. *Barnes Mfg. Co.* v. *Norden* (1902) 67 N. J. L. 493. The cases above were all interpretations of our National Bankruptcy Laws, but the principles upon which they rest would be equally applicable to any state enactment. The courts of Maine are apparently isolated by their adherence to their early decisions.

CARRIERS—SHIPMENT—IMPROPER PACKING.—In a suit for damages against a carrier for injury to goods in transit, the jury found for the defendant, although he knew at the time of loading that the goods had been defectively packed. The plaintiff moves for judgment notwithstanding the verdict. *Held,* since the evidence presented a question

for the jury as to whether it was apparent to the carrier that he could not carry the goods safely, motion denied. *Northwestern Marble & Tile Co.* v. *Williams* (Minn. 1915) 151 N. W. 419.

A recognized exception to the almost absolute liability of a carrier as insurer of goods accepted for transportation, is the case where the loss is due to improper packing by the shipper. *Goodman* v. *Oregon, etc. Co.* (1892) 22 Ore. 14; see *Carpenter* v. *Baltimore & O. R. R.* (Del. 1906) 6 Penn. 15. It is sometimes said that if the bad packing contribute in any measure to the injury, the carrier is not liable; *Menner* v. *Delaware, etc. Co.* (1898) 7 Pa. Super. Ct. 135; *Reed & Walker* v. *Philadelphia, etc. R. R.* (Del. 1864) 3 Houst. 176, 212; *cf. Ross* v. *Troy & Boston R. R.* (1877) 49 Vt. 364; but the better rule repudiates any doctrine of contributory negligence, and requires that the shipper's negligence be the sole cause of the injury. *McCarthy & Baldwin* v. *Louisville & N. R. R.* (1893) 102 Ala. 193; *Union Ex. Co.* v. *Graham* (1875) 26 Oh. St. 595; see *Revilla Fish, etc. Co.* v. *American-Hawaiian S. S. Co.* (1913) 77 Wash. 49. Although the shipper might have packed so as to avoid injury, if the loss be due to the negligence of the carrier, he is liable; *Klauber* v. *American Ex. Co.* (1866) 21 Wis. 21; *cf. Union Ex. Co.* v. *Graham, supra;* if, however, the shipper's negligence be the proximate, though not the sole, cause of the loss, he may recover only nominal damages. *Baldwin* v. *London, etc. Ry., L. R.* [1882] 9 Q. B. Div. 582. The carrier may refuse to receive goods improperly packed, *Vicksburg Liquor Co.* v. *United States Ex. Co.* (1890) 68 Miss. 149; see *Fitzgerald* v. *Adams Ex. Co.* (1865) 24 Ind. 447, but if he fail to exercise this right, he is bound to use due care with reference to their condition, *The David & Caroline* (C. C. 1865) 5 Blatchf. 266; *Atlantic Coast Line R. R.* v. *Rice* (1910) 169 Ala. 265, unless the defect in packing be a latent one of which the carrier is in ignorance. See *Klauber* v. *American Ex. Co., supra.* If the improper packing was apparent to him, or if he was negligent anyhow, he may be held liable; *McCarthy & Baldwin* v. *Louisville & N. R. R., supra*; but he should not be held liable, if he be free from negligence in carriage, and if the loss resulted from a condition of the goods, of which he was reasonably unaware, that entailed greater risk or required greater care to avoid.

CONSPIRACY—FEDERAL CRIMINAL CODE § 37—DEFRAUDING THE GOVERNMENT.—The defendants demurred to an indictment charging them with conspiring to corrupt an election for Representatives in Congress and United States Senators in violation of a part of Criminal Code, § 37, which makes it an offense to conspire to defraud the United States in any manner and for any purpose. *Held,* the demurrer should be overruled, since an actual property or financial loss to the government is not a necessary element of that offense. *United States* v. *Aczel* (D. C. 1915) 219 Fed. 917.

Criminal Code § 37, better known as Rev. Stat. § 5440, was originally a part of the Internal Revenue Law. Act of March 2, 1867, c. 169; see *United States* v. *Fehrenback* (C. C. 1875) 2 Woods, 175. However, the original act was collocated in the Revised Statutes under the title "Crimes", and it was judicially declared a few years later that this section was not limited to conspiracies to commit offenses against the revenue laws or to defraud the revenue, but was intended to apply to all conspiracies to commit crimes under the federal laws, *United States* v. *Sanche* (C. C. 1881) 7 Fed. 715, or to defraud the government of any kind of property or dues. *United States* v. *Thomp-*

son (C. C. 1886) 29 Fed. 86; *United States* v. *Owen* (D. C. 1887) 32 Fed. 534. For many years the scope of this clause was thus apparently limited to cases of conspiracies which, if successful, would have involved a pecuniary loss to the United States. Then cases arose in which the courts were called upon to interpret the word "defraud" as applied in this section, and it was held to include the deprivation by deception or artifice not merely of property rights but also of any rights of government, *United States* v. *Bunting* (D. C. 1897) 82 Fed. 883; *Curley* v. *United States* (C. C. A. 1904) 130 Fed. 1; See *Palmer* v. *Colladay* (1901) 18 App. D. C. 426, on the theory that the purpose of this act is to secure the wholesome administration of the laws and affairs of the United States in the interests of the government. *United States* v. *Moore* (C. C. 1909) 173 Fed. 122. It has been admitted that this statute, being penal, should be strictly construed; *United States* v. *Robbins* (D. C. 1907) 157 Fed. 999; yet this broad interpretation has been unhesitatingly accepted, and is now firmly established in the federal courts. *United States* v. *Morse* (C. C. 1908) 161 Fed. 429; *Haas* v. *Henkel* (1910) 216 U. S. 462.

CONSTITUTIONAL LAW — DUE PROCESS — SEGREGATION ORDINANCE.—An ordinance provided a scheme of segregation which prohibited white and colored persons from residing in the same block. The plaintiff, a colored person, purchased a house and lot from a white person on a block occupied partly by white persons, and was subsequently notified that the ordinance would be enforced against him. *Held,* the ordinance was unconstitutional since it deprived the plaintiff of the right to enjoin his property, without due process. *Carey* v. *City of Atlanta* (Ga. 1915) 84 S. E. 456.

All property is held on the condition that the State may, in the exercise of its police power, restrict its enjoyment and use. McGehee, Due Process of Law, 336; Freund, Police Power, § 516. Furthermore, no one can complain of any consequential injuries that result from a valid exercise of the police power. Cooley, Constitutional Limitations, 548; *cf. Mugler* v. *Kansas* (1887) 123 U. S. 623; *Beer Co.* v. *Massachusetts* (1877) 97 U. S. 25, 32. The police power embraces any regulation that is necessary to preserve good morals and good neighborhood. See Cooley, Constitutional Limitations, 829. Accordingly, it may be urged that the segregation scheme in the principal case was a valid exercise of the police power since it was calculated to promote harmonious relations between the races and so preserve the public welfare. *Cf. Plessy* v. *Ferguson* (1896) 163 U. S. 537; *L'Hote* v. *New Orleans* (1900) 177 U. S. 587. The objection that the plaintiff is deprived of the enjoyment of his property would, in this view, seem to be untenable, since the injury is merely incidental to the carrying out of a valid regulation. See 11 Columbia Law Rev. 24, 33-34. Moreover, assuming that segregation, as determined by the legislative authority, is necessary for the preservation of peaceful relations between the races, the personal enjoyment of his property by the plaintiff would bear a close analogy to a nuisance. The plaintiff then should not be heard to insist upon the use of his property to the annoyance of the public. See 2 Tiedeman, State and Federal Control of Persons and Property, § 145.

CONSTITUTIONAL LAW—DUE PROCESS—WAIVER OF RIGHT TO BE PRESENT AT RENDITION OF THE VERDICT.—The defendant's counsel waived the

presence of the defendant at the rendition of the verdict in a capital case, and the accused failed to make any objection to it in a later motion for a new trial. The state court held that this amounted to an acquiescence in the waiver sufficient to preclude its use as a basis for a subsequent motion to set aside the verdict as unconstitutional under the fourteenth amendment. *Held,* that the practice of permitting a defendant to waive his presence at the rendition of the verdict is not repugnant to the Due Process Clause of the fourteenth amendment. *Frank* v. *Mangum* (U. S. Sup. Ct. Oct. Term 1914, April 15, 1915). Not yet reported.

For a discussion of this case in the state court reaching the same conclusion as in the principal case, see 15 Columbia Law Rev. 166.

CONSTITUTIONAL LAW—EX POST FACTO LEGISLATION.—A law of South Carolina changed the method of inflicting the death penalty from hanging to electrocution. *Held,* The law was not *ex post facto* in its application to offenses commited before it went into effect. *Malloy* v. *State* (U. S. Sup. Ct., Oct. Term No. 172, April 5, 1915). Not yet reported. See Notes, p. 524.

CONSTITUTIONAL LAW—POLICE POWER—FREEDOM OF THE PRESS—CENSORSHIP OF MOVING PICTURES.—Statutes of Ohio and Kansas required moving picture films to be examined and passed by a censor before exhibition. *Held,* this was a valid exercise of the police power in the interests of public morals and was not an infringement of freedom of speech or of the press. *Mutual Film Corporation* v. *Industrial Commission* (1915) 35 Sup. Ct. Rep. 387; *Mutual Film Corporation* v. *Hodges* (1915) 35 Sup. Ct. Rep. 393.

Undoubtedly a State may under its police power constitutionally require licenses for the exhibition of moving pictures, *McKenzie* v. *McLellan* (N. Y. 1909) 62 Misc. 342; *Higgins* v. *Lacroix* (1912) 119 Minn. 145, and in the interests of public safety, compel cinematograph operators to pass an examination, *State* v. *Ebert* (1912) 117 Md. 373, and prescribe the size and construction of booths for moving picture machines. *Matter of Whitten* (N. Y. 1912) 152 App. Div. 506. The indisputable right of the States to prohibit obscene publications and entertainments has been held to extend to the imposition of censorship on moving pictures. *Block* v. *Chicago* (1909) 239 Ill. 251. Since immunity from previous censorship on publication as distinguished from responsibility for its misuse is the essence of freedom of speech and of the press, 2 Kent, Comm. *17; 2 Story, Constitution, § 1885; *cf. Brandreth* v. *Lance* (N. Y. 1839) 8 Paige Ch. *24, the legislation in the principal case would be unconstitutional if the exhibition of moving pictures falls within the scope of the constitutional guaranty. Theatrical performances have been held entitled to its protection, *Dailey* v. *Superior Court* (1896) 112 Cal. 94, and since moving pictures are instrumentalities for the transmission of thought, and actual words and sentences are often thrown upon the screen, such a form of publication would seem to merit as much protection as the printing of the same words or sentences on paper. The decision in the principal cases must be regarded as exhibiting the tendency of the court to construe constitutional provisions liberally rather than to invalidate state legislation which is directly connected with the interests of public safety and morals.

CORPORATIONS—STOCK DIVIDENDS—VALIDITY.—The trustee in bankruptcy of a corporation brought action to recover from the stockholders the value of stock issued to them as a stock dividend. *Held,* since the dividend had been declared in good faith, the stockholders were not liable. *Northern Bank & Trust Co.* v. *Day* (Wash. 1915) 145 Pac. 182.

If the assets of a corporation exceed the amount of its debts and capital stock, no harm is done if the excess is applied in paying subscriptions to an increase of capital stock, which can be distributed among the stockholders as a dividend. *Williams* v. *Western Union Tel. Co.* (1883) 93 N. Y. 162; Thompson, Corporations (2nd ed.) § 3437; but *cf. Fitzpatrick* v. *Dispatch Pub. Co.* (Ala. 1887) 2 So. 727; 83 Ala. 604. There is some dispute as to whether a stockholder can be compelled to accept such a dividend in lieu of money, it being argued that a stockholder has absolute control over his share in the profits and cannot be compelled to reinvest it as capital. *Cf. Williams* v. *Western Union Tel. Co.* (N. Y. 1881) 9 Abb. N. C. 419, 426; *Hoole* v. *Great Western R. R.* (1868) 17 L. T. N. S. 453; *Stamford Trust Co.* v. *Yale & Towne Mfg. Co.* (1910) 83 Conn. 43. But the creditors of the corporation cannot complain unless there is such a gross overissue as to be a fraud on those advancing credit in reliance on such fictitious capital, and then only subsequent creditors can object. *Anglo-American, etc. Co.* v. *Lombard* (C. C. A. 1904) 132 Fed. 721, 735. The danger of such fraud has led to statutes in some States prohibiting stock dividends. Cook, Corporations (6th ed.) § 51. Even in the absence of such statutes, the creditor is adequately protected by the rule laid down either by decision or statute in most States that where stock is paid for in overvalued property a creditor can, in the event of the corporation's insolvency, recover from the stockholder the difference between the value of the stock and that of the property. Thompson, Corporations (2nd ed.) §§ 3978-9, 4935-6. In applying this rule, some courts agree with the principal case in holding that if the property transferred for stock was in good faith regarded by the parties as adequate payment, the stockholders are not liable, but that a decisive discrepancy in value is evidence of fraud. *Whitlock* v. *Alexander* (1912) 160 N. C. 465; 40 Cyc. 473-5. Other courts apply the "true value" rule, which is that any over-valuation leaves the shares unpaid to that extent, and renders the stockholders liable to make up the deficiency regardless of whether there was actual fraud. See *Lantz* v. *Moeller* (1913) 76 Wash. 429; *Cole* v. *Adams* (1898) 19 Tex. Civ. App. 507.

CRIMINAL LAW—HOMICIDE—CAUSE OF DEATH—MEDICAL TREATMENT.—The defendant shot the deceased and inflicted wounds not necessarily mortal. Some days later the victim died from the effects of a septic peritonitis caused by a miscarriage resulting from the shock. The defendant pleaded unskilfull medical treatment as a defense. *Held,* such treatment is no defense if the act of the defendant resulted in the death of the victim. *People* v. *Kane* (1915) 213 N. Y. 260.

It is well settled that a person cannot be convicted of homicide unless his act directly causes the death, and if some agency intervenes, the defendant will be excused. *State* v. *Angelina* (W. Va. 1913) 80 S. E. 141; *State* v. *Wood* (1881) 53 Vt. 560; *Bush* v. *Commonwealth* (1880) 78 Ky. 268; see *People* v. *Ah Fat* (1874) 48 Cal. 61. But a disobedience of the physician's orders, *Crum* v. *State* (1886)

64 Miss. 1, or a refusal to submit to a surgical operation, see *State* v. *Edgerton* (1896) 100 Ia. 63, or a lack of surgical attention, *State* v. *Smith* (1875) 10 Nev. 106, will not be considered such an intervening cause as to excuse the defendant. If, however, the defendant can prove that the death of the victim was due solely to grossly negligent treatment, he will be exonerated, 1 Hale's P. C. 428; *Coffman* v. *Commonwealth* (Ky. 1874) 10 Bush. 495; *Parsons* v. *State* (1852) 21 Ala. 300; see *State* v. *Briscoe* (1878) 30 La. Ann. 433, although there is some authority for the view that where the wound is mortal no reason then exists for showing negligent treatment; see *People* v. *Cook* (1878) 39 Mich. 236. This would seem wrong on principle, for it would be holding that two individuals, not in any way conspiring, are both guilty of the death of the same person where only one actually caused the death. However, the result in the principal case seems correct, for where the defendant inflicts a wound which is the direct cause of a disease or necessitates an operation which kills the victim, the defendant is guilty, for he has set in motion a chain of events which brings on death for which he should be accountable. *Dumas* v. *State* (1909) 159 Ala. 42; *Bishop* v. *State* (1905) 73 Ark. 568; *Commonwealth* v. *Eisenhower* (1897) 181 Pa. 470, *Hamblin* v. *State* (1908) 81 Neb. 148.

CRIMINAL LAW—TRIAL—RIGHT TO SEVERANCE.—Five persons were separately indicted in connection with one robbery, and upon their application separate trials were granted. The first was tried and acquitted; the second was tried, but before the jury had returned its verdict the appellant was placed on trial over his objection. *Held,* there was no error. *Bruce* v. *State* (Tex. Crim. App. 1915) 173 S. W. 301.

The general rule at common law is that persons jointly indicted are, for reasons of public convenience and justice, to be jointly tried, and may not demand separate trials as a matter of right. *United States* v. *Marchant* (1827) 12 Wheat. 480; *People* v. *Covitz* (1914) 262 Ill. 514, 550; *Commonwealth* v. *Barasky* (1913) 214 Mass. 313. Where, however, it appears from the nature of the case or from the defenses interposed that a joint trial would probably be prejudicial to the rights of the parties, the court may, upon application, direct a severance. The matter is wholly within the discretion of the trial court, and its decision cannot be questioned except for a plain abuse. *Emery* v. *State* (1899) 101 Wis. 627; *State* v. *Brauneis* (1911) 84 Conn. 222; *State* v. *Nixon* (N. J. 1914) 90 Atl. 1102. The common law rule has been changed in many jurisdictions, however, by statutes which give to a defendant the right to a separate trial, and it is mandatory upon the court to grant the severance when requested; *King* v. *State* (1869) 35 Tex. Crim. 472; see *Hoffman* v. *Commonwealth* (1909) 134 Ky. 726; but if the defendant delays in demanding a separate trial until the joint trial has begun, he may be deemed to have waived his rights under the statute and cannot later claim a severance. *State* v. *Madden* (1913) 90 Kan. 736; *Metz* v. *State* (1895) 46 Neb. 547; *Hooper* v. *State* (Tex. Crim. App. 1913) 160 S. W. 1187. Nor do these statutes give a defendant an implied right to demand a joint trial, and a severance may be ordered on the application of the prosecution or, where justice so requires, by the court of its own motion. *State* v. *Roberts* (1901) 50 W. Va. 422; *Hoffman* v. *Commonwealth, supra.* The object of granting a severance in many cases is to secure the defendant the testimony of a co-defendant in case the latter is acquitted; but it has been

held that after granting the severance the court is under no obligation to await the final determination of the case first tried before it proceeds with the trial of the others. *Krebs* v. *State* (1880) 8 Tex. App. 1, 26; *cf. Sims* v. *State* (1900) 68 Ark. 188. Since the defendant, if convicted, would be entitled to a new trial on the ground of newly discovered evidence if the testimony would have been beneficial to his defense, and since the court might often have to wait an unreasonable time before bringing him to trial, the decision in the principal case seems correct.

DAMAGES—CONVERSION—CUTTING OF STANDING TIMBER.—The defendant lumber company innocently cut timber on plaintiff's land under mistaken belief that it was the true owner. *Held,* the measure of damage for conversion is the value of the timber at the time and place of the conversion, since the cutting was done in good faith. *Bradley Lumber Co.* v. *Hamilton* (Ark. 1915) 173 S. W. 848.

A recovery for the wrongful cutting of standing timber may be had in either trespass or trover, and in some states in replevin. As the gist of the action of trespass is the disturbance of possession, the measure of damage is the difference between the value of the land before and after the cutting. *Disbrow* v. *Westchester Hardwood Co.* (1900) 164 N. Y. 415; *Morison* v. *American Tel. etc. Co.* (N. Y. 1906) 115 App. Div. 744; see *Eldridge* v. *Gorman* (1905) 77 Conn. 699. If apart from the value of the trees cut no damage is done to the freehold, the measure would be their value as standing timber if the cutting was innocent. *Foote* v. *Merrill* (1874) 54 N. H. 490; *King* v. *Merriman* (1887) 38 Minn. 47; *Clark* v. *Holdridge* (N. Y. 1897) 12 App. Div. 613; but *cf. Smith* v. *Gonder* (1857) 22 Ga. 353. But when trover is brought the trespass to the land is waived and the gravamen of the action is that of conversion. Generally the conversion is held to be at the time when the tree is converted into a chattel and the damage allowed is the value of the timber immediately after severance. *White* v. *Yawkey* (1895) 108 Ala. 270; *Moody* v. *Whitney* (1854) 38 Me. 174; *Ayres* v. *Hubbard* (1885) 57 Mich. 322; but *cf. Trustees of Dartmouth College* v. *International Paper Co.* (C. C. A. 1904) 132 Fed. 92, *Skinner* v. *Pinney* (1882) 19 Fla. 42, plus interest or ordinary profits. *Beede* v. *Lamprey* (1888) 64 N. H. 510; *Winchester* v. *Craig* (1876) 33 Mich. 205. If the cutting was willful, however, the enhanced value of the timber at the time and place of demand is allowed, *Brown* v. *Sax* (N. Y. 1827) 7 Cow. 95; *Heard* v. *James* (1873) 49 Miss. 236, on the theory that the plaintiff still has title and may retake the timber in its improved state or recover its enhanced value, *Central Coal etc. Co.* v. *John Henry Shoe Co.* (1901) 69 Ark. 302; *Nesbitt* v. *St. Paul Lumber Co.* (1875) 21 Minn. 491, or that the willful trespasser or his vendee is deprived of the right of deduction for expenses. *Wooden Ware Co.* v. *United States* (1882) 106 U. S. 432; *Parker* v. *Waycross etc. R. R.* (1888) 81 Ga. 387. But such damages are really punitive, *Winchester* v. *Craig, supra; Railway Co.* v. *Hutchins* (1877) 32 Ohio 571, and would seem to be out of proportion to the wrong committed.

DESCENT AND DISTRIBUTION—HALF BLOOD—ANCESTRAL ESTATE.—A remainder was given in a deed of trust by the uncle of the life tenant to the latter's next of kin. The nephew died leaving a half brother not of the blood of the settlor and also children and grandchildren of

the granting uncle. *Held,* the half brother took the entire estate. *Farmers' Loan & Trust Co.* v. *Polk* (N. Y. 1915) 166 App. Div. 43. See Notes, p. 526.

ELECTRICITY—NEGLIGENCE—DEGREE OF CARE.—The plaintiff's intestate while removing moth nests from trees, as required by statute, extended his cutting apparatus over adjoining land to reach nests in the overhanging branches, and was killed by contact of the apparatus with an uninsulated high voltage wire maintained by the defendant on the adjoining land. *Held,* the verdict that death was due to the defendant's negligence, free from any contributory negligence of the deceased, was justified by the evidence. *Philbin* v. *Marlborough Electric Co.* (Mass. 1914) 105 N. E. 893.

Electricity is uniformly regarded by the courts as one of the most dangerous agencies known to man and one, therefore, requiring the exercise of the highest degree of care by those who use it. The public is not charged with knowledge of the degree of danger of electric wires, *Giraudi* v. *Electric Improvement Co.* (1895) 107 Cal. 120; *Nelson* v. *Branford, etc. Co.* (1903) 75 Conn. 548; *Fitzgerald* v. *Edison etc. Co.* (1901) 200 Pa. 540, affd. (1903) 207 Pa. 118, and the company must by maintaining sufficient safety devices and by constant inspection and repair, provide against injury to persons who they may have reason to anticipate would be exposed to its deadly force. *Braun* v. *Buffalo General Electric Co.* (1911) 200 N. Y. 484; *Geisman* v. *Missouri-Edison etc. Co.* (1902) 173 Mo. 654, 674; *Wade* v. *Empire etc. Co.* (Kan. 1915) 147 Pac. 63. Where, however, the injured person knows of the danger and voluntarily exposes himself to it, he is guilty of contributory negligence relieving the company from liability, *Fraenthal* v. *Laclede Gaslight Co.* (1896) 67 Mo. App. 1; *Shade* v. *Bay Counties Power Co.* (1907) 152 Cal. 10; *Rowe* v. *Taylorville Electric Co.* (1904) 213 Ill. 318, even though he did not know the exact extent of the danger. *Johnston* v. *New Omaha etc. Co.* (1907) 78 Neb. 24, 27. Since in the principal case it cannot be said as a matter of law that the defendant was not negligent in failing to insulate the wires at the place where the injury occurred, nor that the defendant was contributorily negligent, these questions were properly submitted to the jury, see *Griffin* v. *United etc. Co.* (1895) 164 Mass. 492; *Braun* v. *Buffalo etc. Co., supra,* and its verdict would seem to be supported by the evidence.

EMINENT DOMAIN—DAMAGES—APPORTIONMENT.—The city charter provided that in eminent domain proceedings the city might apportion the damage among the various holders of the different interests in the property. The city awarded a gross sum as damages including the injury to the lessee, and paid it to the owner of the fee, although the lessee seasonably asked for separate damages. In an action by the lessee to set aside the award, *held,* the failure to apportion the award did not render it invalid. *State ex rel. Kafka* v. *District Court of Ramsey County* (Minn. 1915) 151 N. W. 144.

It is well settled that a lessee of property condemned under eminent domain proceedings is entitled to compensation for his interest. Lewis, Eminent Domain (3rd ed.) § 525; *City of Detroit* v. *C. H. Little Co.* (1906) 146 Mich. 373; *Shaw* v. *Philadelphia* (1895) 169 Pa. 506. When the property taken is subject to a lease, the interest of both the owner and the lessee are to be determined, and the proper mode of procedure

is first to ascertain the compensation as though the property belonged in the entirety to one person, Lewis, Eminent Domain (3rd ed.) § 719; *Lambert* v. *Giffen* (1913) 257 Ill. 152, and then to award separately the damages sustained by each party, according to his interest. See *Miller* v. *Asheville* (1893) 112 N. C. 759; *Law* v. *Sanitary District* (1902) 197 Ill. 523. If there is any dispute as to the title, all claimants should be made parties to the proceedings to determine the gross amount, and the court will later, on the settling of the dispute, apportion the damages accordingly. *Davidson* v. *Texas etc. R. R.* (1902) 29 Tex. Civ. App. 54; *cf. Cincinnati etc. R. R.* v. *Bay City etc. R. R.* (1895) 106 Mich. 473, 478. It is essential to the validity of the proceedings that some adequate provision be made for the payment of damages to the parties entitled; *In re Lincoln Park* (1890) 44 Minn. 299; and although the lessee would have a right of action against the owner of the fee for his share of the damages, if the entire sum had been paid to him, *Harris* v. *Howes* (1883) 75 Me. 436, such a remedy would not fulfill the requirement for security of compensation. See *Bloodgood* v. *Mohawk & Hudson R. R.* (N. Y. 1837) 18 Wend. 9, 18. Since, however, the fund turned over to the owner in the principal case is regarded as still in the possession of the city to such extent as is necessary to protect the lessee, and may be brought into court by him to be apportioned, *Crane* v. *City of Elizabeth* (1882) 36 N. J. Eq. 339; *North Coast R. R.* v. *Hess* (1909) 56 Wash. 335, his protection would seem to be adequate.

EVIDENCE—ACCOUNT BOOKS—ENTRIES IN THE COURSE OF BUSINESS.—On a trial for murder the card indexes of a large mail order house were offered to show the sale of a revolver. The department manager identified the records, but the numerous clerks participating in the recording were not called. *Held,* the entries were admissible. *State* v. *Virgens* (Minn. 1915) 151 N. W. 190. See Notes, p. 535.

EVIDENCE—DEFECTIVE HIGHWAYS—SIMILAR ACCIDENTS.—In an action to recover damages for the death of the plaintiff's intestate alleged to have been caused by the defective condition of the city's streets, the plaintiff was allowed to introduce evidence tending to show that other accidents had occurred at the same place. *Held,* such evidence was competent as tending to show that the street was in a dangerous condition. *City of Chickasha* v. *White* (Okla. 1915) 146 Pac. 578.

Evidence of the occurrence of previous similar accidents is generally competent in an action to recover for injury caused by defective highways for the purpose of showing notice to the defendants of the dangerous character of the place. *Hall* v. *City of Shenandoah* (Ia. 1914) 149 N. W. 831; *City of Chicago* v. *Powers* (1866) 42 Ill. 169; *contra, Williams* v. *Inhabitants of Winthrop* (1913) 213 Mass. 581. Such evidence is also admissible, by the weight of authority, in order to show that the defect complained of was a nuisance, *Darling* v. *Westmoreland* (1872) 52 N. H. 401; *House* v. *Metcalf* (1858) 27 Conn. 631, and as evidence of the existence of the defect itself. *District of Columbia* v. *Armes* (1882) 107 U. S. 519; *City of Aurora* v. *Brown* (1882) 12 Ill. App. 122; *Quinlan* v. *City of Utica* (N. Y. 1877) 11 Hun 217, affd. 74 N. Y. 603. Some courts, however, declare that evidence of this sort is inadmissible because it tends to introduce too many collateral issues, and compels the defendant to meet evidence that is a surprise to him. *Collins* v. *Inhabitants of Dorchester* (Mass.

1850) 6 Cush. 396; *Moore* v. *City of Richmond* (1888) 85 Va. 588; *Phillips* v. *Town of Willow* (1887) 70 Wis. 6. The better rule, however, would seem to be that such evidence, being relevant, is not to be invariably excluded, but only where it does in the particular case involve such confusion of issues, leaving the matter to the discretion of the court. Wigmore, Evidence, §§ 443, 458; see *Darling* v. *Westmoreland, supra.* In any case where evidence of other accidents is received, however, they must be shown to have occurred at the same place and under similar circumstances. *Perrine* v. *Southern Bitulithic Co.* (Ala. 1914) 66 So. 705; *Lawrence* v. *City of Frankfort* (Ky. 1915) 172 S. W. 953. Although notice of the defect was admitted by the defendant in the principal case, since the evidence offered was also competent to prove the dangerous character of the place, it was properly admitted. *Smith* v. *City of Seattle* (1903) 33 Wash. 481.

HABEAS CORPUS—ENLISTMENT OF MINOR—DISCHARGE ON APPLICATION OF PARENT.—After service of a writ of habeas corpus sued out by the relator to recover the custody of her minor son who had enlisted in the army, falsely stating that he was of age, he was arrested and held for trial by court martial on a charge of fraudulent enlistment. *Held,* the enlistment was binding upon the minor, and his parent or guardian cannot recover custody of him till he has answered for his military offenses. *United States* v. *Williford* (C. C. A. 1915) 220 Fed. 291.

Enlistment differs from most other contracts in that it creates a status, *United States* v. *Blakeney* (1847) 44 Va. 405, which cannot be destroyed by showing that the recruit was at the time he enlisted an alien, *United States* v. *Codingham* (1843) 40 Va. 615, or above the prescribed age. *In re Grimley* (1890) 137 U. S. 147. It was early settled that Congress may constitutionally authorize the enlistment of minors, *United States* v. *Bainbridge* (C. C. 1816) 1 Mason, 71, and, at common law, the status thus created so far suspends the parental control that the minor cannot thereafter be released from the service either on his own or on his parents' application. *United States* v. *Blakeney, supra; Commonwealth* v. *Gamble* (Pa. 1824) 11 S. & R. 93. Now, however, § 1117 U. S. Rev. Stat. forbids the enlistment of minors without the written consent of parent or guardian. This renders the enlistment voidable, not at the option of the minor, but of his parent. *In re Morrissey* (1890) 137 U. S. 157. But since the minor is both *de facto* and *de jure* a soldier, he is answerable for his military offenses, and his parent is clearly not entitled to his release if he has been brought under the jurisdiction of a court martial. *Dillingham* v. *Booker* (C. C. A. 1908) 163 Fed. 696; *In re Dowd* (D. C. 1898) 90 Fed. 718. Even though the jurisdiction of the court martial has not attached until after the service of the writ of habeas corpus, the better view is, as held in the principal case, that the military authorities should be allowed to punish the minor for offenses against the military law before he will be returned to the custody of his parents. *Ex parte Lewkowitz* (C. C. 1908) 163 Fed. 646; see *In re Dowd, supra; contra, Ex parte Houghton* (C. C. 1904) 129 Fed. 239; *In re Carver* (1900) 103 Fed. 624.

HOMESTEADS—TRESPASS—EFFECT OF SETTLEMENT BY THE GOVERNMENT.—The plaintiff, in accordance with the homestead laws of the United States, filed his non-saline affidavit. Subsequently, the defendant cut timber on the land with notice of the plaintiff's right and

removed it. A settlement was then made between the government and the defendant, damages being estimated on the basis of an unintentional trespass. The plaintiff now sues the defendant to recover damages for the trespass. *Held,* the defendant could not set up the settlement with the government as a defence. *Knapp* v. *Alexander-Edgar Lumber Co.* (U. S. Sup. Ct., Oct. Term 1914, No. 139). Not yet reported.

After a homesteader has made entry, but before his patent to the land is issued, the legal title remains in the government. *Shiver* v. *United States* (1895) 159 U. S. 491; see *Stone* v. *United States* (1897) 167 U. S. 178. The homesteader, however, has the exclusive right of possession, U. S. Rev. Stat. 2nd. 1878 §§ 2289 *et seq.*; see *Gauthier* v. *Morrison* (1914) 232 U. S. 452, 460; *Sturr* v. *Beck* (1890) 133 U. S. 541, 548, and consequently he may recover damages for appropriating the land, *Burlington, etc. R. R.* v. *Johnson* (1887) 38 Kan. 142, or bring an action of ejectment, *Wormouth* v. *Gardner* (1894) 105 Cal. 149, and some States have enacted eminent domain statutes giving him the rights of an owner in condemnation suits. *Lee* v. *Watson* (1895) 15 Mont. 228. After the homesteader, by issuance of the patent, acquires title, it dates from the time of the filing of the entry claim by the doctrine of relation back, and he may maintain an action for timber cut during occupancy. *Peyton* v. *Desmond* (C. C. A. 1904) 129 Fed. 1; but see *Brown* v. *Throckmorton* (1850) 11 Ill. 529. On this theory, the plaintiff in the principal case should be allowed to maintain his action for the surplus of damages which the court found to be due over those paid the government by the defendant. The court in allowing a full recovery places its decision chiefly on the ground that the act of the defendant was wilful, and that as towards the plaintiff there was bad faith in his settlement with the government of which he should not be allowed to take advantage.

INJUNCTIONS—IRREPARABLE INJURY—TRESPASS.—The plaintiff, owner of river bed asked that defendant be enjoined from removing sand from the river bed, claiming this constituted irreparable injury. *Held,* that as sand of a river is an ever shifting element, that which is removed being quickly replaced, and as the quantity and value of the sand could be ascertained, the injury was not irreparable, and an injunction would not be granted. *Lamphear* v. *Subers* (N. J. 1915) 93 Atl. 194. See Notes, p. 537.

LANDLORD AND TENANT—RENT—LIABILITY OF ASSIGNEE.—The plaintiff leased for five years to a corporation which went into possession and occupied the premises for a year. The lessee was then adjudged bankrupt, and the receiver assigned the lease to the defendant corporation which then took possession. After occupying the premises for about two years the defendant abandoned the property and notified the plaintiff that its occupancy was at an end. The plaintiff refused to consent to this action and sued for rent accruing after the abandonment. *Held,* the assignment created a privity of estate between the lessor and the assignee so as to render the latter liable for rent. *78th Street & Broadway Co.* v. *Pursell Mfg. Co.* (N. Y. App. Div., First Dept., 1915) 152 N. Y. Supp. 52.

A lease creates both privity of estate and privity of contract between lessor and lessee. When the lessee assigns his interest he still remains liable on the contract with his landlord, in the absence of an agree-

ment to discharge him or of circumstances from which such an agreement may be inferred. 9 Columbia Law Rev. 271. Such an assignment, however, does terminate the privity of estate between the original parties to the lease, and creates privity between the lessor and the assignee, so as to enable the former to maintain an action for breach of any covenant which runs with the land. Chaplin, Landlord & Tenant, § 351; but *cf. Fechter* v. *Schonger* (N. Y. 1907) 53 Misc. 648. Since the assignee's liability does not depend on occupancy, actual going into possession is not essential to the existence of this privity, which may be created by any act which shows an acceptance of the assignment. *Moore* v. *Chase* (N. Y. 1899) 26 Misc. 9; *Chicago etc. Co.* v. *Davis S. M. Co.* (Ill. 1890) 25 N. E. 669; but see *Damainville* v. *Mann* (1865) 32 N. Y. 197. Once the privity has been established the assignee may escape liability for the non-performance of covenants which run, only by an assignment of his interest, *Dassori* v. *Zarek* (N. Y. 1902) 71 App. Div. 538, or by a surrender of the premises with the consent of the original lessor. *Chicago etc. Co.* v. *Davis S. M. Co., supra.* In the principal case, the lessor refused to accept surrender when it was tendered by the assignee, and the court, therefore, properly held that the liability to pay rent under the covenant which ran to the defendant was not extinguished.

MORTGAGES—FORECLOSURE—ATTORNEY'S FEES AS LIEN.—A mortgage provided that in case of foreclosure the mortgagor should be liable for a reasonable attorney's fee. *Held,* the fee, when allowed, becomes a lien on the property secured by the mortgage. *Jensen* v. *Lichtenstein* (Utah 1915) 145 Pac. 1036.

Unless the provision for attorney's fees is for the purpose of indemnity, it will not be enforced, see *Soles* v. *Sheppard* (1881) 99 Ill. 616, especially if it is a cover for usury. See 10 Columbia Law Rev., 352. If, however, the stipulation is purely for indemnity, it follows that the fees will not be allowed unless they were actually paid, *Bank of Woodland* v. *Treadwell* (1880) 55 Cal. 379, nor will they be granted if the foreclosure proceedings are defective, due to the fault of the mortgagee. *Pollard* v. *American Freehold, etc. Co.* (1893) 103 Ala. 289. Courts of equity have inherent power to regulate the amount to be allowed for attorney's fees, and may reduce the amount stipulated for in the instrument if unreasonable. *Warwick Iron Co. v. Morton* (1892) 148 Pa. 72. In fact, many States have enacted statutes specifying the maximum allowance for costs in foreclosure actions. N. Y. Code Civ. Proc. § 3253. Where the mortgage fails to stipulate for attorney's fees and only secures the principal and interest of a note given therewith, the fees will not constitute a lien on the land, even though the note contains a provision for such fees in case of foreclosure. *Clemens* v. *Luce* (1894) 101 Cal. 432. This view seems very narrow, for it is obvious that by the stipulation for attorney's fees in case of foreclosure, the parties must have intended to bind the land for the payment of such fees in addition to the principal and interest. Thus, where notes provide for attorney's fees, but the mortgage fails so to provide, the fees are a lien if the mortgage expressly secures payment of the notes. *Peachy* v. *Witter* (1901) 131 Cal. 316; *Armijo* v. *Henry* (1907) 14 N. M. 181. Of course, where it is provided that attorney's fees should be included as costs in the decree for foreclosure, there is no difficulty in declaring them a lien on the land. *Haensel* v. *Pacific States, etc. Co.* (1901) 135 Cal. 41.

MUNICIPAL CORPORATIONS—LIABILITY FOR PROPERTY DESTROYED BY MOBS.—Under a statute making municipalities liable for injuries done by mobs to property within its limits, the plaintiff sought to recover for damages to its business as well as for the destruction of its tangible property. *Held,* the plaintiff was not entitled to recover for the injury to its intangible property. *Wells Fargo & Co.* v. *Mayor* (C. C. A. 3rd Cir., 1915) 219 Fed. 699. See Notes, p. 532.

NEGLIGENCE—FIRES—DUTY OF PROPERTY OWNERS.—A fire originating in a boarding car belonging to the defendant company spread through intervening property to that of the plaintiff. *Held,* that although there was no negligence in kindling the fire nor in its spreading over the intervening property, yet the defendant was under a duty to follow up the fire and extinguish it before it reached the plaintiff's land. *St. Louis Southwestern Ry.* v. *Anderson* (Tex. Civ. App. 1914) 173 S. W. 908.

At common law, anyone starting a fire was liable for any resulting injury regardless of the question of negligence. Burdick, Torts (3rd ed.) 509. This absolute responsibility no longer exists, however, and negligence is the gist of an action for such an injury. *Webb* v. *Rome, etc. R. R.* (1872) 49 N. Y. 420; *Hewey* v. *Nourse* (1866) 54 Me. 256. When fires are intentionally set, liability may be established by negligence in kindling or by failure to properly guard them. *Read* v. *Penn. R. R.* (1882) 44 N. J. L. 280; see *Beckham* v. *Seaboard Air-Line Ry.* (1906) 127 Ga. 550. The amount of care required varies according to the risk which might reasonably be apprehended, *Lloyd Chemical Co.* v. *Mathes & Sons Rag Co.* (1909) 145 Mo. App. 675; see *McNally* v. *Colwell* (1892) 91 Mich. 527, taking into consideration all surrounding circumstances. *Robinson* v. *Cowan* (1908) 158 Ala. 603. Thus, while it is evidence of negligence to set fires during dry times, *Ulrich* v. *Stephens* (1908) 48 Wash. 199, or when there is a strong wind, *Miller* v. *Neale* (1908) 137 Wis. 426, there is no duty to guard against unforeseen circumstances. See *Steffens* v. *Fisher* (1911) 161 Mo. App. 386. Although a fire may have started on premises without the knowledge or through no fault of the owner thereof, yet it seems to be generally settled that he is under a duty after discovering the fire to use ordinary care to prevent its spreading to adjacent property, *Baird* v. *Chambers* (1906) 15 N. D. 618; *Excelsior Products Mfg. Co.* v. *Kansas City So. Ry.* (Mo. 1914) 172 S. W. 359; see *Beckham* v. *Seaboard Air-Line Ry., supra;* but see *Kenney* v. *Hannibal & St. Joseph R. R.* (1897) 70 Mo. 252, and if the fire resulted from the conduct of his business and could be extinguished with ordinary care by going upon neighboring property, a failure so to do has been held to be actionable negligence. *Missouri Pac. Ry.* v. *Platzer* (1889) 73 Tex. 117. In some States liability for injury by fire is regulated by statutes. See 3 Shearman & Redfield, Negligence (6th ed.) § 671.

PUBLIC SERVICE CORPORATIONS—PERFORMANCE OF PUBLIC DUTIES—MANDAMUS AGAINST SUCCESSORS IN INTEREST.—The defendant purchased the assets and franchises of a bankrupt electric lighting company, and to destroy competition, closed down the plant. *Held,* he assumed the burdens of an involuntary trustee of a public trust, and may be compelled by mandamus to perform the public duties of the corporation. *State ex rel. Howie* v. *Benson* (Miss. 1915) 67 So. 214.

It is well settled to-day that mandamus may be employed to compel public service corporations to carry out the tasks they have been

created or empowered to perform. *Railroad Commissioners* v. *Portland etc. R. R.* (1872) 63 Me. 269; *Haugen* v. *Albena Light etc. Co.* (1891) 21 Ore. 411; *Central etc. Tel. Co.* v. *State* (1888) 118 Ind. 194; *Golden Canal Co.* v. *Bright* (1884) 8 Colo. 144. Occasionally this result is attained on the ground that the duties of a corporation arise from a contract made with the government; *Mahan* v. *Michigan Tel. Co.* (1903) 132 Mich. 242; *People* v. *New York etc. R. R.* (N. Y. 1883) 28 Hun 543; or that acceptance of the franchise gives rise to a public trust. *State* v. *Minn. Trans. Ry.* (1900) 80 Minn. 108; *People* v. *New York etc. R. R., supra;* see *Cozzens* v. *North Fork Ditch Co.* (1905) 2 Cal. App. 404. Since, however, mandamus is not generally available to enforce contract obligations or the performance of a trust, the true theory seems to be that performance of the tasks is a public duty imposed on the corporation by law; see 1 Wyman, Public Service Corp. § 331; and being such, is enforcible by mandamus. High, Extraordinary Legal Remedies (3rd ed.) §§ 10, 41. See 11 Columbia Law Rev. 687. If the franchise of the corporation has been transferred, mandamus may be invoked against the successor in interest, whether purchaser, assignee, or lessee; *Mahan* v. *Michigan Tel. Co., supra; Chicago etc. Ry.* v. *People* (1898) 79 Ill. App. 529; *People* v. *St. Louis etc. R. R.* (1908) 176 Ill. 512; *Bridgeton* v. *Traction Co.* (1898) 62 N. J. L. 592; either where he becomes connected directly with the obligations of his predecessor by express assumption, statute, or provision of franchise, *People* v. *Farmers' etc. Canal Co.* (1898) 25 Colo. 202; *School District* v. *LeMars Water etc. Co.* (1906) 131 Ia. 14; *Bridgeton* v. *Traction Co., supra,* or even in absence of a direct assumption, since the acceptance of the assignor's privileges necessarily subjects him to the burdens and responsibilities. *City of Potwin Place* v. *Topeka Ry.* (1893) 51 Kan. 601; *State* v. *Street Ry.* (1898) 19 Wash. 518; *Grosse Point Township* v. *Detroit etc. Ry.* (1902) 130 Mich. 363; *cf. Mahan* v. *Mich. Tel. Co., supra.*

SALES—CONDITIONAL SALE—WAIVER OF RIGHT TO RETAKE.—The vendor, who had reserved title till the price should be fully paid, took and enforced a note from a third party for a part of the price, and after default by the buyer, brought replevin to recover the goods. *Held,* he had not waived his right to retake them. *Franklin Office Furniture Co. v. Knickerbocker Land Corporation* (N. Y. Sup. Ct., Trial Term, 1915) 53 N. Y. L. J. 148.

It is generally held that a vendor in a conditional sale does not waive his reservation of title by taking collateral security by mortgage on the goods or otherwise, nor by receiving notes for the whole of the purchase price, unless he expressly accepts them in satisfaction of the debt. See 15 Columbia Law Rev. 195. Nor does the sale become absolute by the sale of the note, but the title to the goods, which was reserved to secure payment of the note, passes to the purchaser of the latter. *Spoon* v. *Frambach* (1901) 83 Minn. 301; but see *Winton etc. Co.* v. *Broadway Automobile Co.* (1911) 65 Wash. 650. By the weight of authority, however, a conditional vendor elects to treat the sale as absolute, thus vesting title in the vendee and waiving his right to retake the goods, if he asserts a mechanic's lien against them, *Kirk* v. *Crystal* (N. Y. 1907) 118 App. Div. 32; see *Van Winkle* v. *Crowell* (1892) 146 U. S. 42, or if he sues for the purchase price. *Frisch* v. *Wells* (1909) 200 Mass. 429; *Alden* v. *Dyer & Bro.* (1904) 92 Minn. 134; *Smith* v. *Barber* (1899) 153 Ind. 322. But since the parties have

expressly agreed that title shall not pass until the purchase price is paid, these remedies should be regarded as concurrent and not inconsistent with the vendor's retaining ownership, unless they have resulted in the recovery of the purchase price. *Warner etc. Co.* v. *Building & Loan Assn.* (1901) 127 Mich. 323; *Vaughn* v. *Hopson* (Ky. 1874) 10 Bush. 337; *Campbell etc. Co.* v. *Rockaway Pub. Co.* (1894) 56 N J. L. 676. The principal case is unquestionably right in holding that part payment does not divest the vendor's right to retake the goods upon the subsequent default of the vendee. Burdick, Sales (3rd ed.) § 88.

SEDUCTION—RIGHT OF DIVORCED MOTHER TO SUE DURING FATHER'S LIFETIME.—A mother who had been divorced without any decree as to the custody of the children, sued for the seduction of her minor daughter, who lived with the plaintiff and helped about the house, although employed elsewhere during the day. *Held,* she can recover. *Malone* v. *Topfer* (Md. 1915) 93 Atl. 397.

Although a parent may recover damages for the shame and dishonor resulting from a daughter's seduction, the action is based on the relation of master and servant rather than that of parent and child. *Grinnell* v. *Wells* (1844) 7 M. & G. *1033; *Hobson* v. *Fullerton* (1879) 4 Ill. Ap. 282. However, it is held that a father, being entitled to control his minor children and receive their earnings, is *de jure* the master of a minor daughter, although *de facto* she may be the servant of another, provided he has not terminated his rights. *White* v. *Nellis* (1865) 31 N. Y. 405; *Mohry* v. *Hoffman* (1878) 86 Pa. 358; *Blagg* v. *Ilsley* (1879) 127 Mass. 191. But during the father's life the mother has no such common law right to her daughter's earnings and services, 1 Blackstone, Comm. *453; *Hobson* v. *Fullerton, supra,* see *South* v. *Denniston* (Pa. 1834) 2 Watt 474, at least in the absence of court award, *Elder* v. *Warner* (Sup. Ct. 1911) 129 N. Y. Supp. 816, so that there is no common law right of control from which service could be implied. *Cf. Bartley* v. *Richtmyer* (1850) 4 N. Y. 38; but see *Certwell* v. *Hoyt* (N. Y. 1876) 6 Hun 575. But if no such right of control exists, on account of the majority of the daughter or the relation of the plaintiff, the action is still maintainable if the relationship of master and servant can be shown by any service, however slight, even without an express contract of service. *Lipe* v. *Eisenlerd* (1865) 32 N. Y. 229; *Davidson* v. *Abbott* (1880) 52 Vt. 570; *Harper* v. *Luffkin* (1827) 7 B. & C. 387. If the action is brought by one who can suffer from the girl's dishonor, damages will be assessed on the basis of the injured feelings rather than the actual loss of service. *Anderson* v. *Aupperle* (1908) 51 Ore. 556; see *Blagge* v. *Ilsley, supra.* Therefore, in the principal case the mother, although not entitled to claim as parent the service of her daughter, would seem to receive sufficient actual service to enable her to maintain the action, and recover the damages which the courts allow to an injured parent. *Coon* v. *Moffett* (1809) 3 N. J. L. 583; *Badgley* v. *Decker* (N. Y. 1865) 44 Barb. 577; *Davidson* v. *Abbott, supra.*

TRIAL—IRREGULARITIES—COMMUNICATION BETWEEN JUDGE AND JURY.—Where a judge, after the jury had retired, sent them at their request an instruction, the nature of which did not appear, such action being without the consent of the parties or counsel, *held,* it was error requiring a new trial. *Lewis* v. *Lewis* (Mass. 1915) 107 N. E. 970.

Where a justice went to the door of the jury room after the jury had retired and there answered a question which they propounded to him, *held,* it was error requiring a reversal. *Rorinson* v. *Woodard* (1914) 151 N. Y. Supp. 655. See Notes, p. 539.

TRUSTS—NEW YORK TRUSTS—REVOCABILITY OF TRUSTS IN PERSONAL PROPERTY—INTERESTS OF REMAINDERMAN.—The plaintiff in 1904 gave a sum of money to the defendant to invest and apply the income to the use of the plaintiff during her life, with remainder over as she should appoint, and in default of appointment to such persons as would be entitled thereto by law as her husband and next of kin. She now brings suit against the defendant alone to recover a portion of the principal under Laws of 1909, c. 247, now § 23 of the Personal Property Law. *Held,* she should recover. *Goodwin* v. *Broadway Trust Co.* (N. Y. Sup. Ct., 1914) 87 Misc. 130.

The interest of a person beneficially interested in a trust to receive rents and profits was made inalienable by the Revised Statutes, Part II, tit. II, art. 2, § 63, and this section was construed to apply to trusts of personalty. *Graff* v. *Bonnett* (1865) 31 N. Y. 9; Chaplin, Express Trusts & Powers, 650. In 1893, however, a statute, (Laws of 1893, c. 452), permitted a person beneficially interested in the entire trust estate to release to himself the interest in the income thereof, so that the estate of the trustee would cease and determine. The statute was expressly made retroactive, and this feature was held constitutional. See *Metcalf* v. *Union Trust Co.* (1905) 181 N. Y. 39. The Personal Property Law of 1897, c. 417, continued the previous enactment, nevertheless omitting the retroactive clauses thereof, see *Metcalf* v. *Union Trust Co., supra,* but in the year 1903 the beneficial interest in trusts of personal property was again made totally indestructible. Laws of 1903, c. 88. This was modified by Laws of 1909, c. 247, to the extent of permitting the creator of a trust in personalty to revoke the whole or a portion of said trust with the consent of all persons beneficially interested. This act is by its terms retroactive, and since this provision has been held constitutional, *Hoskin* v. *L. I. etc. Co.* (N. Y. 1910) 139 App. Div. 258, affd. 203 N. Y. 588, the Statute of 1909 clearly covers the trust in the principal case. Although the interest of the next of kin in remainder would seem to be alienable, irrespective of the fact whether their estate is vested or contingent, see Consolidated Real Property Law, § 59; *Moore* v. *Littel* (1869) 41 N. Y. 66; but see *Whittemore* v. *Equitable Trust Co.* (N. Y. 1914) 162 App. Div. 607, it has been recently held, in accordance with the decision in the principal case, that such next of kin have no interest sufficient to entitle them to be made parties to a suit under the Statute of 1909. *Robinson* v. *N. Y. Life Ins. Co.* (N. Y. 1912) 75 Misc. 361; *Whittemore* v. *Equitable Trust Co., supra.*

USURY—MORTGAGES—PAYMENT OF RECORDING TAX BY MORTGAGOR.—Under a statute imposing a tax on the recording of mortgages but not providing who should pay it, a mortgagor agreed to pay the tax in addition to the maximum legal interest on the loan secured. *Held,* this agreement did not render the transaction usurious. *Seamen's Bank for Savings* v. *McCollough* (Sup. Ct. App. Div., 1st Dept. 1915) 151 N. Y. Supp. 600.

Any pretense or contrivance to gain more than the legal rate of interest, whether such surplus be directly paid or not, amounts to

usury and will taint the contract to which it attaches. *Wilkie* v. *Roosevelt* (N. Y. 1802) 3 Johns. Cas. *206. Accordingly where a lender exacts of a borrower in addition to interest the payment of ordinary taxes levied on a mortgage given in security or on the indebtedness, and these combined exceed the legal rate of interest, the contract will be treated as usurious. *Meem* v. *Dulaney* (1892) 88 Va. 674; see *Mortimer* v. *Pritchard* (S. C. 1831) Bailey's Eq. 505; *Vandervelde* v. *Wilson* (1913) 176 Mich. 185; *contra, Dubose* v. *Parker* (1848) 13 Ala. 779. These cases rest on the proposition that such taxes are imposed on the ownership of the debt or mortgage and would normally fall upon their owner, and payment of them inures directly to the benefit of the mortgagee so as to bring the transaction within the definition of usurious contracts. On the other hand, such expenses as are incurred in making the loan, and are incident to rather than a result of its consummation, usually may be exacted of the borrower without the taint of usury attaching to the transaction. Webb, Usury, § 323; Comyn, Usury, 160; see *London Realty Co.* v. *Riordan* (1913) 207 N. Y. 264. The tax in the principal case falls properly within the latter class. It was an exaction of the State incident to the full validity of the mortgage, and before it was paid no effective security for the loan existed. Therefore its payment by the mortgagor in addition to legal interest did not amount to usury. *Lassman* v. *Jacobson* (1914) 125 Minn. 218; *Moore* v. *Lindsay* (N. Y. 1908) 61 Misc. 176.

VENUE—LOCAL ACTIONS—WAIVER.—The plaintiff brought an action of replevin but not in the county required by statute. The defendant answered to the writ, but later moved to dismiss the action because of the wrong venue. *Held,* as the venue in local actions touches the question of jurisdiction, the defendant did not waive his objection by answering, and his motion to dismiss was rightly granted. *Central Maine Power Co.* v. *Maine Central R. R.* (Me. 1915) 93 Atl. 41.

At common law the venue in a transitory action was immaterial, and the court had jurisdiction wherever it was laid. *Gay* v. *Homer* (1833) 30 Mass. 535, 542; 1 Chitty, Pleading, *282. In most jurisdictions, however, statutes require that the action be brought in the county wherein the defendant resides or is found. These statutes do not affect the general jurisdiction of the court, but are for the personal convenience of the defendant, and he is generally regarded as waiving the privilege by failing to object to a wrong venue within an "apt time". *Cleveland* v. *Welsh* (1808) 4 Mass. 591; *Commissioners* v. *Griffin* (1890) 134 Ill. 330; *Forbes* v. *Davison* (1839) 11 Vt. 660, 670. In local actions, however, both at common law and under statute, the venue is material, being limited usually to the county where the cause of action arose. 1 Chitty, Pleading, *281; see *Vermilya* v. *Beatty* (N. Y. 1848) 6 Barb. 429. It is often held, as in the principal case, that in local actions a wrong venue is not merely a question of procedure, which may be waived, but that it affects the jurisdiction of the court; *Central etc. Ry.* v. *Dowe* (1909) 6 Ga. App. 858; see *Woodward* v. *Edmunds* (1899) 20 Utah 118, 121; and the defendant may therefore raise his objection at any stage of the proceedings. *Louisville, N. A. & C. Ry.* v. *Davis* (1882) 83 Ind. 89; but see *Chicago & S. E. Ry.* v. *Wheeler* (1895) 14 Ind. App. 62. A different view prevails in other jurisdictions, however, and even in local actions the defendant is regarded as having a privilege which he waives by failure to object in

time. *Gillen* v. *Illinois Cent. Ry.* (1910) 137 Ky. 375; *Blackford* v. *Lehigh Valley R. R.* (1890) 53 N. J. L. 56; *Foster* v. *Gulf C. & S. F. Ry.* (1898) 91 Tex. 631. If the court has inherent jurisdiction of the matter, there would seem to be no vital objection to the latter view, since the rule providing for venue is exclusively a matter of private right of the defendant, and no question of public policy or morals is involved. *Sentenis* v. *Ladew* (1893) 140 N. Y. 463.

WILLS—RENUNCIATION OF LEGACIES—TIME OF VESTING.—The testator devised his house and premises to a church to be used as a residence for the pastor, "and for no other purpose whatsoever." The church, by resolution and notice to the executors, refused the devise under the conditions named. In a contest between the residuary legatees and the heirs at law of the testator, *held,* the disclaimer of the devise by the church was effective, and the property should go to the residuary legatees. *Albany Hospital* v. *Hanson* (N. Y. Court of Appeals) 6 Rochester Daily Record, No. 50, April 27, 1915.

While a devisee may refuse to accept the benefits conferred on him by a will, *Matter of Stone* (1906) 132 Ia. 136; *Hidden* v. *Hidden* (1869) 103 Mass. 59, by the early law his disclaimer was required to be by matter of record; *Butler and Baker's Case* (1591) 3 Coke's Rep. 25; 4 Cruise Dig. Tit. 32, c. 22, § 2; but later it might be by deed. *Townson* v. *Tickell* (1819) 3 Barn. & Ald. 31; *Bryan* v. *Hyre* (1842) 40 Va. 94; but see Shepherd's Touchstone, *452. More recent decisions, however, have almost universally admitted the effectiveness of a parol disclaimer. *Burritt* v. *Silliman* (1855) 13 N. Y. 93; *Adams* v. *Adams* (1880) 64 N. H. 224; *contra, Standing* v. *Bowring* (1883) L. R. 31 Ch. D. 282. The earlier courts took the view that title vested in the devisee immediately upon the instrument becoming operative, *Doe d. Smyth* v. *Smyth* (1826) 6 B. & C. 112; *Bryan* v. *Hyre, supra; Butler & Bakers Case, supra;* see *Thompson* v. *Leach* (1690) 2 Vent. 198, and under this view it would seem that an equally solemn instrument might be required to divest title. Other courts have held, however, as intimated in the principal case, that title to the property vests only upon the express or implied assent of the devisee, *Defreese* v. *Lake* (1896) 109 Mich. 415; *Welch* v. *Sackett* (1860) 12 Wis. 260; *Peacock* v. *Eastland* (1870) L. R. 10 Eq. 17, and then relates back to the time when the instrument went into effect. See *Bradford* v. *Calhoun* (1908) 120 Tenn. 53; *Townson* v. *Tickell, supra.* Where this view is taken it may be consistently held that a parol disclaimer is effective, and the result reached in the principal case is in accord with the great weight of modern authority.